Office-Supreme Court, U.S.
FILED
JAN 25 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. and SPECIAL INVESTMENTS, INC., *Petitioners*

v.

INDIAN LAKE ESTATES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. H. KRUG
839-17th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioners, Ten Individual Defendants and Net Limited, Inc.

ALBERT PHILIPSON
Brawner Building
Washington, D. C. 20006
Counsel for Petitioner, Special Investments, Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
1. The holding that Judge Pine's order of March 24, 1964 was appealable although it lacked a Rule 54(b) determination conflicts with decisions of this Court, especially Sears, Roebuck & Co. v. Mackey	8
2. In holding that a sham "amendment"—a carbon copy of the dismissed pleading—rendered the dismissal order unappealable, the Court of Appeals ruling is inconsistent with decisions of this Court, and of other Courts of Appeal	11
3. The Court of Appeals holding that under the 1963 amendment corporations barred from pleading "statutes against usury" are nevertheless free to plead the Loan Shark Law is of importance to the financial community not only in the District of Columbia, but in many states where similar statutes exist	14
APPENDIX A	1a
APPENDIX B	14a
APPENDIX C	16a
APPENDIX D	18a

CITATIONS

CASES: Page

Bush v. *United Benefit Fire Ins. Co.*, 311 F. 2d 893 (5th Cir.) 9
Byrne v. *Kysar*, 347 F. 2d 734 (7th Cir.) 12, 13
Cleary Bros. v. *Christie Scow Corp.*, 176 F. 2d 370 (2d Cir.) 13
Courembis v. *Independence Avenue Drug Fair, Inc.*, 115 U.S. App. D.C. 7, 316 F. 2d 658 9
Dickinson v. *Petroleum Conversion Corporation*, 338 U.S. 507 9
Due v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630 (5th Cir.) 13
Foman v. *Davis*, 371 U.S. 178 .....11, 13
Hartman v. *Lubar*, 77 U.S. App. D.C. 95, 133 F. 2d 44 (1942) 15
Jung v. *K. & D. Mining Co., Inc.*, 356 U.S. 335 13
Kinsley v. *Markovic*, 333 F. 2d 684 (4th Cir.) 12, 13
Marotta v. *Milestone*, 114 U.S. App. D.C. 237 (314 F. 2d 242 10
Orme v. *Lendahand Co., Inc.*, 76 U.S. App. D.C. 49, 128 F. 2d 756 14
Randolph v. *Randolph*, 91 U.S. App. D.C. 170, 198 F. 2d 956 11
Scholl v. *District of Columbia*, 118 U.S. App. D.C. 98, 331 F. 2d 1018 12
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427 .....9, 10, 11
Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143 16
Unitde States v. *The Three Friends*, 166 U.S. 1 13
Walter W. Johnson Company v. *R.F.C.*, 223 F. 2d 101 (9th Cir.) 9

STATUTES AND RULES:

Federal Rules of Civil Procedure

Rule 54(b) 2, 3, 5, 7, 8, 9, 10, 11, 12
Rule 73(a) 11

Public Law 88-111 .....3, 8, 14, 15

D. C. Code Page

Section 29-904(h) 4
Section 29-933a 4, 5
Section 28-2703 ..... 3, 14
Section 26-601 ..... 3, 8, 14, 15
Section 26-605 14

MISCELLANEOUS:

Comment, 23 Md. L. Rev. (1963) 51 15
Curran, *Trends in Consumer Credit Legislation* (1965) 15
Gallert, et al., *Small Loan Legislation* (1932) 14
Hubachek, *The Drift Toward a Consumer Credit Code*, 16 U. Chi. L. Rev. (1949) 4 16
Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 Law and Contemp. Prob. (1954) 609 14
"The Loan Shark Problem Today," 19 Law. and Contemp. Prob. No. 1 (Winter issue 1954) 14
Moore's Federal Practice (2d ed.) § 58.05[2] 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. and SPECIAL INVESTMENTS, INC., *Petitioners*

v.

INDIAN LAKE ESTATES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 7, 1965.

OPINIONS BELOW

The orders of the District Court (Appendix B, *infra*) are not reported. The opinion of the Court of Appeals (Appendix A, *infra*) is not reported. The orders of the Court of Appeals denying rehearing (Appendix C, *infra*) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1965 (R. 119). Rehearing was denied on October 7, 1965 (R. 135, 136). On December 29, 1965, by order of Mr. Justice Clark, the time within which to file a petition for certiorari was extended to January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The effect of orders by Judge McGarraghy on December 3 and 19, 1963, was that the amended complaint would stand dismissed on January 2, 1964 unless respondent amended by that date. A Rule 54(b) determination was incorporated. On January 2, respondent filed a purported "second amended complaint" which consisted of a verbatim copy of the amended complaint plus one item—respondent's withdrawal from the District of Columbia—which respondent had already presented to Judge McGarraghy and on which he had ruled adversely to respondent. Petitioners were forced to file a new motion to dismiss. On March 24, Judge Pine granted the motion, stating that "all relevant issues" had been raised and argued before Judge McGarraghy. Although the case involved multiple claims, respondent did not seek to obtain a Rule 54(b) determination, but nevertheless appealed from Judge Pine's order. The Court of Appeals held: 1) respondent had "amended" and therefore was not required to appeal from the order of December 3 as modified December 19 in order to protect its rights; 2) Judge Pine's order of March 24, 1964 was "final and appealable"; 3) the statute barring the pleading of "statutes against usury" embraced

general usury statutes but not D. C. Code §§ 26-601 to 611, the Loan Shark Law, because the latter was a "licensing statute" (although it regulated the rate of interest).

The questions presented are:

(1) Whether the appeal should have been dismissed because the order of March 24, 1964 did not contain a Rule 54(b) determination.

(2) Whether the appeal should have been dismissed as untimely because respondent failed to appeal from Judge McGarraghy's order of December 3, 1963 as modified December 19.

(3) Whether the statute barring a corporation from pleading "statutes against usury" is confined to general usury statutes and leaves a corporation free to plead small loan statutes such as the Loan Shark Law, which provides for licensing and other means of regulating interest rates.

STATUTES INVOLVED

Rules 54(b) and 73(a), Fed. R. Civ. Proc., Public Law 88-111, and Sections 29-904(h), 29-933a, 28-2703, 26-601 and 26-605 of the District of Columbia Code (1961) are set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

The amended complaint filed in February 1963 alleged violation of certain statutes regulating the rate of interest—D.C. Code (1961) § 28-2703, the general usury statute; D.C. Code §§ 26-601 *et seq.*, known as the Loan Shark Law; and a Florida usury statute (R. 1, 14).

In September 1963 petitioners moved to dismiss the action because Public Law 88-111 approved September

3, 1963 barred corporations from pleading "any statutes against usury in any action" (R. 33). This amendment to Section 4(h) of the District of Columbia Business Corporation Act, D.C. Code § 29-904(h), applied in terms only to a "corporation formed hereunder," i.e., to a domestic corporation. But, as defendants-petitioners showed, Congress did not discriminate against domestic corporations by permitting a foreign corporation, such as respondent, to plead "statutes against usury" in the District of Columbia courts. D.C. Code § 29-933a provides (Appendix D) that a foreign corporation

> "shall be subject to the same . . . restrictions . . . imposed upon a domestic corporation of like character."

Petitioners' motion to dismiss was fully briefed and argued (R. 34-60), and at the close of the argument on November 27, 1963 Judge McGarraghy ruled that he would grant the motion because "the action in this case is barred by the statute . . ." (R. 60) At respondent's request, however, the order of December 3, 1963 dismissing the amended complaint gave respondent leave to amend within twenty days (App. B). Respondent later requested a 10-day extension of this 20-day period, so that at the end of thirty days it could either amend or file an appeal. Petitioners acquiesced and on December 19, 1963 Judge McGarraghy entered a consent order which recited:

> ". . . that plaintiff desires an additional period to January 2, 1964 within which either to further amend or to appeal . . ." (App. B)

The December 19 order extended to January 2, 1964 the time within which to amend, and provided that no

further extension of time for leave to amend would be granted. Petitioners placed a Rule 54(b) determination in the form of order presented to Judge McGarraghy, which was entered on December 19, in order to permit respondent to appeal promptly, despite the multiple claims and parties involved (R. 61). Petitioners had filed counterclaims; also additional parties had been brought in and various cross-claims were pending (R. 26, 32; docket entries in District Court dated April 11, 1963, May 1, 1963, May 4, 1963, October 11, 1963 and October 28, 1963).

On January 2, 1964 respondent purported to exercise its leave to amend, by filing a so-called second amended complaint (R. 62). In actual fact, this was no amendment. It was a verbatim copy of the amended complaint which had been ordered dismissed, except for one item. It alleged that respondent was authorized to do business in the District of Columbia until it was issued a certificate of withdrawal in June 1960 (par. 2). However, this purported new material was not new; it had been fully presented to Judge McGarraghy. Prior to the argument on the motion to dismiss, respondent had submitted a certified copy of the certificate of withdrawal, and in its memorandum and in argument respondent contended that the withdrawal relieved it from the statutory bar against pleading statutes against usury which applied to domestic corporations (R. 39, 41, 57-58). In the opinion of August 4, 1965, the Court below took note of this. Appendix A, footnote 7. Petitioners, both in a supplemental memorandum and in oral argument, urged that the withdrawal was immaterial, because the statute provided that a foreign corporation after withdrawal from the District would be "subject to the same . . .

restrictions . . . now or hereafter imposed upon a domestic corporation of like character." (R. 44, 48) Judge McGarraghy clearly agreed with petitioners on this issue, for otherwise he would not have granted the motion to dismiss. Indeed, the Court of Appeals in Part II of its opinion expressly ruled against respondent on this point, for the same reason advanced by petitioners before Judge McGarraghy. (Appendix A, p. 10; R. 44, 48).

The purported amendment, therefore, was no amendment, for it merely re-alleged what Judge McGarraghy had already ruled to be insufficient.

Petitioners' desire to facilitate a prompt appeal, in order to have appellate review of Judge McGarraghy's interpretation of the statute (R. 52), was thus frustrated. A new pleading was on file, the purported second amended complaint, and petitioners were forced to file another motion to dismiss in order to dispose of that pleading (R. 76). This was finally accomplished on March 24, 1964, after an interval of almost four months. Petitioners' new motion to dismiss showed that Judge McGarraghy had ruled on all issues, including the contention in the "amendment" as to withdrawal from the District (R. 76, 78, 80, 84). The argument before Judge Pine on March 23, 1964 established that Judge McGarraghy had heard and adjudicated all the issues, including the "withdrawal" contention (R. 78, 80-84, 90-91, 94, 103). Indeed, respondent's counsel twice conceded that he "did argue that fully":

> "THE COURT: Now, he asserts that you argued that fully and briefed that fully before Judge McGarraghy. He has read sections of the transcript. Now, is that true or not?

MR. BECKER: Your Honor, it is true that I did argue that fully . . ."

* * * *

"THE COURT: You have not answered my question yet. Did you not argue that fully before Judge McGarraghy?

MR. BECKER: I said, Your Honor, I did argue the matter before—" (R. 91, 94)

Judge Pine found that the filing of the purported amendment was an attempt to obtain a rehearing before another judge on what Judge McGarraghy had heard and decided, and ruled that respondent should have sought to appeal if it wished a review of Judge McGarraghy's decision (R. 92, 103). Judge Pine's order of March 24, 1964, dismissing the action, expressly found

> "that all relevant issues were raised and argued by counsel before Judge Joseph C. McGarraghy of this Court on November 27, 1963 and that Judge McGarraghy granted the joint motion of defendants to dismiss for failure to state a claim, and that the Second Amended Complaint presents no issues not decided by Judge McGarraghy" (App. B)

Respondent did not ask Judge Pine to make a Rule 54(b) determination, and the order does not contain such a determination. The Court of Appeals was briefed on the absence of such determination (R. 125).

The Court of Appeals held that respondent was not required to appeal from Judge McGarraghy's order, in order to protect its rights, because the "withdrawal" contention had not been placed before Judge McGarraghy "on the pleadings" (App. A, p. 6). The court had the mistaken impression that "the consequences of

the fact of withdrawal" had not been "put into contention" before Judge McGarraghy (*id.*, p. 7; cf. R. 48). The court concluded that Judge Pine "erred in ruling that all 'relevant issues' had been raised and disposed of by the December 3, 1963 order." The court asserted that Judge Pine's order was "final and appealable" and maintained this position even though the critical absence of a Rule 54(b) determination was brought to its attention (*id.*, p. 8; R. 125).

The court held, correctly, that the statute barring corporations from pleading statutes against usury applied to respondent despite its withdrawal from the District of Columbia (*id.*, pp. 10-11).

Finally, the court held that the so-call "Loan Shark Law", D.C. Code §§ 26-201 *et seq.* (engaging in the business of lending money at more than six per cent without a license) is not within "statutes against usury" because it is "a licensing statute." The court rejected petitioners' contention that small loan laws such as the Loan Shark Law have been uniformly treated as specialized usury statutes, and that Congress therefore intended "statutes against usury" to embrace the Loan Shark Law (*id.*, pp. 12-13; R. 127-131).

REASONS FOR GRANTING THE WRIT

1. The Holding That Judge Pine's Order of March 24, 1964 Was Appealable Although It Lacked a Rule 54(b) Determination Conflicts With Decisions of This Court, Especially Sears, Roebuck & Co. v. Mackey

Judge Pine's order of March 24, 1964 disposed of respondent's claim, but left outstanding a number of counterclaims and cross-claims (R. 26, 32; docket entries in District Court dated April 11, May 1, May 4, October 11 and October 28, 1963). The court below

was of course aware that the action involved multiple claims (App. A, p. 3). As petitioners pointed out below, Judge Pine did not make the "determination and direction" provided for in Rule 54(b). The Rule expressly declares (Appendix D) that in the absence of such "determination and direction," an order such as that of Judge Pine "shall not terminate the action as to any of the claims or parties, and the order . . . is subject to revision at any time. . . .

The decision below that Judge Pine's order was "final and appealable" is in square conflict with *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 435-438 (1956) and also with *Dickinson* v. *Petroleum Conversion Corporation,* 338 U.S. 507, 511, 512 (1950). This Court held in *Sears, Roebuck*:

> "To meet the demonstrated need for flexibility, the District Court is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." [1] [Emphasis in original] 351 U.S. at 435.

This Court in *Sears, Roebuck* emphasized that the purpose of Rule 54(b) is to afford certainty as to appealability in multiple claims litigation:

> "This arrangement already has lent welcome certainty to the appellate procedure. Its 'negative

[1] In accord with *Sears Roebuck* the courts of appeals including the court below have uniformly held that in a Rule 54(b) situation the prescribed determination is a prerequisite to appealability. See *Courembis* v. *Independence Avenue Drug Fair, Inc.,* 115 U.S. App. D.C. 7, 316 F. 2d 658 (1963); *Walter W. Johnson Company* v. *R.F.C.,* 223 F. 2d 101 (9th Cir. 1955); *Bush* v. *United Benefit Fire Ins. Co.,* 311 F. 2d 893 (5th Cir. 1963).

> effect' has met with uniform approval. The effect so referred to is the rule's specific requirement that for 'one or more but less than all' multiple claims to become appealable, the District Court must make both 'an express determination that there is no just reason for delay' and 'an express direction for the entry of judgment.' A party adversely affected by a final decision thus knows that his time for appeal will *not* run against him until this certification has been made." [Emphasis in original] *id.*

The decision below defeats that purpose.

In support of its holding that Judge Pine's order was "final and appealable" the court cited *Marotta* v. *Milestone,* 114 U.S. App. D.C. 237, 314 F. 2d 242 (1963) (App. A, footnote 14). There the Court properly held that Rule 54(b) did not apply, because the outstanding claims of other parties had been disposed of shortly after the filing of the notice of appeal. But the opinion in *Marotta* also stated:

> ". . . [T]he order of the District Court now before us could not, because of the nature of the other claims, have been on their account 'subject to revision at any time before the entry of judgment adjudicating all the claims . . .' . . . ."

The decision below will be taken to mean that, notwithstanding *Sears, Roebuck,* a Court of Appeals may, if it chooses, dispense with the requirement of a Rule 54(b) determination. Or, because of the citation of *Marotta* v. *Milestone* containing the language quoted above, the decision below will be taken to hold that a Court of Appeals may dispense with the Rule 54(b) requirement if the District Court order "could not, because of the nature of the other claims, have been on

their account 'subject to revision. . . .' . . . ." The decision destroys the certainty as to appealability which Rule 54(b) was designed to afford. *Sears, Roebuck & Co.* v. *Mackey, supra.* Parties will be tempted to appeal in situations covered by Rule 54(b) without requesting the prescribed determination.

2. In Holding That a Sham "Amendment"—a Carbon Copy of the Dismissed Pleading—Rendered the Dismissal Order Unappealable, the Court of Appeals Ruling Is Inconsistent With Decisions of This Court, and of Other Courts of Appeal

Rule 73(a) precludes the use of appeals for delay by requiring timely notice of appeal "when an appeal is permitted by law . . ." The Rule carefully specifies that only certain timely motions will terminate the running of the time for appeal. The entry of an appealable judgment starts the time running. Rules 73(a) and 58 (See Appendix D).

> ". . . [T]he time for appeal begins to run from the entry of judgment." *Moore's Federal Practice* (2d ed.) § 58.05 [2]

The decision below will permit widespread evasion of these regulations. It enables a party, in those frequent cases where a pleading is dismissed with leave to amend, to file, instead of a notice of appeal, an "amended complaint" which is a carbon copy of the dismissed pleading, and then to relitigate the issue before another judge, with a new right to appeal if and when the "amended" pleading is held insufficient. This does violence to the appeal Rules heretofore enforced by this Court and by the Courts of Appeal, including the court below. See *Foman* v. *Davis,* 371 U.S. 178 (1962); *Randolph* v. *Randolph,* 91 U.S. App. D.C. 170,

171-172, 198 F. 2d 956, 957 (1952) (motion to vacate order did not terminate running of time for appeal); *Scholl* v. *District of Columbia,* 118 U.S. App. D.C. 98, 331 F. 2d 1018 (1964) ("Absent a timely appeal from the District Court's final order [containing a Rule 54 (b) determination] we are without jurisdiction . . ."). In *Foman* v. *Davis, supra,* this Court made clear that leave to amend should be denied for "undue delay, bad faith or dilatory motive on the part of the movant . . ." 371 U.S. at 182. Surely Judge McGarraghy would have denied leave to amend, if respondent had stated that it intended to file as an "amendment" the same pleading which Judge McGarraghy had just held insufficient. Leave to amend is properly denied where a tendered amendment would not cure the defects. *Byrne* v. *Kysar,* 347 F. 2d 734 (7th Cir. 1965); *Kinsley* v. *Markovic,* 333 F. 2d 684 (4th Cir. 1964) ("Allowance of the amendment could have served no useful purpose whatever".)

Judge McGarraghy's order of December 3, 1963 as modified by the order of December 19 was appealable. These orders gave respondent an election to amend by January 2 if new facts could be alleged to cure the defects in the dismissed pleading, or, if respondent did not amend by January 2, to file notice of appeal within the 30-day period. The effect of the orders was that, unless an amendment was filed by January 2, the amended complaint stood dismissed on that date. Inclusion in the December 19 order of the Rule 54(b) determination underscored the court's determination that, unless an amendment was filed by January 2, the complaint would stand dismissed and the time for appeal would start to run. The unequivocal fixing of January 2 as the date for dismissal of the complaint

distinguishes this case from *Jung* v. *K. & D. Mining Co., Inc.*, 356 U.S. 335 (1958) where the order left "confusion or misunderstanding" and did not "fix an unequivocal terminal date for appealability."

Moreover, respondent affirmatively elected to stand on the dismissed pleading by refiling it. A party whose pleading is ordered dismissed with leave to amend may by his conduct elect to stand on the pleading. Thus, the filing of a notice of appeal operates as an election, and the order is appealable, even though it contains leave to amend. *United States* v. *The Three Friends*, 166 U.S. 1, 49 (1897); *Due* v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630, 633 (5th Cir. 1964); see *Cleary Bros.* v. *Christie Scow Corp.*, 176 F. 2d 370 (2nd Cir. 1949). Here, respondent expressed its election by refiling the same pleading which had been dismissed.[2]

The decision below is inconsistent with the principles of *Foman* v. *Davis*, *Byrnes* v. *Kysar* and *Kinsley* v. *Markovic*, *supra*. It enables a party, who has obtained leave to amend, to file a sham "amendment" and thereby gain rehearing before another judge and substantial delay in the running of time for appeal. In effect, the Court of Appeals has placed its stamp of approval on an act of bad faith toward a District Judge and on a cynical evasion of the Rules governing appeals.

---

[2] Judge Pine found that the refiling of the pleading which Judge McGarraghy had ruled insufficient was actually a motion for rehearing. But such a motion (filed 30 days after the order) was untimely, and therefore could not terminate the running of the time for appeal.

3. The Court of Appeals Holding That Under the 1963 Amendment Corporations Barred From Pleading "Statutes Against Usury" Are Nevertheless Free to Plead the Loan Shark Law is of Importance to the Financial Community Not Only in the District of Columbia, But in Many States Where Similar Statutes Exist

The Court of Appeals correctly holds that the 1963 amendment barring corporations from pleading "statutes against usury" embraces general usury statutes (App. A, p. 11). However, it erroneously holds that the so-called Loan Shark Law, D.C. Code § 26-601 *et seq.*, does not come within "statutes against usury" (App. A, pp. 11-13).

The Loan Shark Law regulates the rate of interest. §§ 26-601, 26-605 (Appendix D).

When Congress acted in 1963, small loan acts such as the District of Columbia Loan Shark Law were uniformly regarded as specialized usury statutes, because they regulated the rate of interest. Gallert, et al., *Small Loan Legislation* (1932) 82, 147.

> "The loan shark evil is a modern, specialized aspect of the problem of usury." Hubachek, *Progress and Problems in Regulation of Consumer Credit,* 19 Law and Contemp. Prob. (1954) 4

When Congress spoke in 1963, it must have intended to include small loan acts such as the Loan Shark Law within "statutes against usury", since they were universally regarded as a kind of usury statute. See, generally, *"The Loan Shark Problem Today",* 19 Law and Contemp. Prob. No. 1 (Winter issue 1954). Indeed, the Court of Appeals below has explicitly recognized that the District of Columbia Loan Shark Law is such a specialized usury statute. *Orme* v. *Lendahand Co., Inc.,* 76 U.S. App. D.C. 49, 52, 53, 54, 128 F. 2d 756,

759, 760, 761 (1942). There, the Court speaking through Judge (later Justice) Rutledge, stated that the Maryland Small Loan Act had a "'policy . . . against usury" and that the statutory penalty was "a preventive against usurious interest". Judge Rutledge expressly noted that a "similar statute" was in force in the District of Columbia, i.e., the Loan Shark Law. 76 U.S. App. D.C. at 51, 128 F. 2d at 758.

The decision below distorts the obvious meaning of the statute and comes as a shock to the financial community. As the opinion notes, ever since 1954 the statute has contained language indicating that a corporation may not plead usury, and indeed the Court of Appeals holds that the 1963 amendment "simply clarified the applicable law . . ." (App. A, pp. 10, 11). Since 1954 and especially since the 1963 amendment lenders have relied on the obvious meaning, i.e., that corporations are barred from pleading the Loan Shark Law as well as general usury statutes. The decision suddenly exposes lenders to the risk of forfeiting principal as well as interest, and gives an unjust windfall to corporate borrowers.[3] The result is largely to repeal the 1963 amendment.

Moreover, the decision is bound to affect the interpretation of similar legislation in many of the states. The Congressional policy barring corporations from pleading usury statutes is a policy prevailing in 19 states. *Comment,* 23 Md. L. Rev. (1963) 51, 54; see Curran, *Trends in Consumer Credit Legislation* (1965) 19, n. 53. The District of Columbia Loan

[3] The Court of Appeals below has held that if a loan is made in violation of the Loan Shark Law, the lender loses principal as well as interest. *Hartman* v. *Lubar,* 77 U.S. App. D.C. 95, 133 F. 2d 44 (1942).

Shark Law is a small loan act of a kind enacted in some 36 states. Hubachek, *The Drift Toward a Consumer Credit Code,* 16 U. Chi. L. Rev. (1949) 609, 617, 618. Thus the decision is bound to exert a widespread influence in the interpretation of the many state statutes.

A decision which has such widespread repercussions outside the District of Columbia should be reviewed by this Court. See *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 145, n. 2 (1949).

Respectfully submitted,

J. H. KRUG
839-17th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioners, Ten Individual Defendants and Net Limited, Inc.

ALBERT PHILIPSON
Brawner Building
Washington, D. C. 20006
Counsel for Petitioner, Special Investments, Inc.

January, 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18586

INDIAN LAKE ESTATES, INC., APPELLANT,

v.

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC., AND SPECIAL INVESTMENTS, INC., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided August 4, 1965

Mr. Ralph E. Becker, with whom *Mr. F. Murray Callahan* was on the brief, for appellant.

Mr. David G. Bress, with whom *Mr. J. H. Krug* was on the brief, for appellees, Ten Individual Defendants and Net Limited, Inc.

Mr. Albert Philipson was on the brief for appellee, Special Investments, Inc.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and FAHY and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge:* We earlier reversed a judgment which had been entered in favor of the appellees in *Indian Lake Estates, Inc.* v. *Lichtman.*[1] We then deemed "not susceptable of disposition by summary judgment" the appellant's claims that the appellees had violated the usury statute, D. C. CODE § 28-2703 (1961), "by charging interest in excess of 8%" and the so-called "Loan Shark Law," D. C. CODE § 26-601—611 (1961), "by lending money with-

[1] 114 U.S. App. D.C. 90, 311 F. 2d 776 (1962).

out a lender's license." After further proceeding in the District Court, the appellant's second amended complaint was dismissed, and this appeal followed.

Following remand, the appellant had filed an amended complaint. It was alleged that the appellees, who include two corporations and ten individuals, between 1955 and 1959 had participated with the appellant through various joint venture groups in some 17 business dealings having nexus with the District of Columbia. The appellant asked the District Court to declare that the transactions had required usurious payments and that the individual appellees should be caused to pay to the appellant usurious interest in the amount of $1,291,000. The appellant also prayed that the court declare its entitlement to recoup the total principal of various "void and illegal loans" in the amount of $2,125,819.31. The several transactions had involved participation by the respective parties in financing large real estate development projects organized by the appellant. The appellant additionally had asked the District Court to declare the two corporate appellees[2] "to be the alter ego of the individual defendants"; that certain assignments of land purchase contracts to the corporate appellees be declared void; and, finally, that the principal of the allegedly void loans "be forfeited by the individual appellees and remitted" to the appellant.

The respective appellees answered in March, 1963, setting up various defenses and counterclaims. The ten individual appellees and the appellee, Net Limited, Inc., represented by Mr. Bress, counterclaimed in part for damages aggregating $250,000. The appellee, Special Investments, Inc., represented by Mr. Albert Philipson, counterclaimed in part for damages of $953,000. At that time D. C. CODE § 29-904(h) (1961) of the "District of

[2] The business address of both corporate appellees and of appellee Robert A. Philipson was listed in the complaint as "1925 K Street, N.W. Suite 201-6, Washington, D.C."

Columbia Business Corporation Act," 68 Stat. 177, (hereinafter referred to as the 1954 Act), provided that a corporation had power "to borrow money at such rates of interest as the corporation may determine without regard to the restrictions of any usury law . . . ." Appellees have pointed to the legislative history of the 1954 Act and of the 1963 amendments which we have examined in detail.

It appears that on April 11, 1963, a Subcommittee of the House Committee on the District of Columbia conducted hearings on H.R. 4330 respecting certain proposed amendments to the 1954 Act.[3] In due course, as of September 3, 1963, Public Law 88-111, 77 Stat. 136, was approved. Pertinent here, D. C. CODE § 29-904(h) (1961) was thereby amended by adding a new sentence:

> "No corporation formed hereunder shall plead any statutes against usury in any action." (D. C. CODE § 29-904(h) (Supp. IV, 1965.))[4]

---

[3] Attorney Albert Philipson then testified representing the Bar Association of the District of Columbia "which is sponsoring H.R. 4330." He filed a statement and explained that section 1 of the bill would add a sentence to section 4(h) of the 1954 Act, *supra*, "to the effect that corporations may not plead usury, thus making clear the meaning of section 4(h) which provides that corporations may 'borrow money at such rates of interest as the corporation may determine without regard to the restrictions of any usury law.'" His testimony throughout referred only to pending amendments to the 1954 Act.

[4] While the language "formed hereunder" on its face applies to domestic corporations, D. C. CODE § 29-933a (1961), provides that a foreign corporation which shall have received a certificate of authority under the Act shall until a "certificate . . . of withdrawal shall have been issued" enjoy the same rights and privileges as, but no greater rights and privileges than, a domestic corporation. The section further provides that a foreign corporation having qualified to transact business within the District "shall be subject to the same duties, *restrictions*, penalties, and liabilities *now or hereafter imposed upon a domestic corporation* of like character." (Emphasis added.)

On September 13, 1963, the appellees joined in filing a motion to dismiss on the ground that the complaint had failed to state a claim upon which relief could be granted. The motion recited, in pertinent part,

> "The action is for alleged usury. By reason of the District of Columbia Business Corporation Act, D. C. Code Secs. 29-904(h) and 29-933a, plaintiff corporation cannot assert usury, as more fully set forth in the memorandum in support hereof."[5]

The appellant's opposition to the motion to dismiss, filed September 27, 1963, relied upon this court's earlier opinion and order, *supra*, and asserted further that the 1963 amendment applied only to corporations "formed hereunder."[6] It argued that since the appellant is a foreign corporation, its rights did not depend upon the provisions of the Business Corporation Act of the District of Columbia.

Such was the state of the record when the "first judge" on November 27, 1963 heard argument on the appellees'

---

[5] The supporting memorandum mentioned in the motion pointed to the amendment in Public Law 88-111 and quoted from the congressional committee reports as follows:

> "Section 1 of the bill amends section 4(h) of the Act by providing expressly that corporations organized under the act may not plead usury. This defines more clearly the intent of the present statute which provides that corporations may borrow money 'without regard to the restrictions of any usury law.'"

See also, Alpern, *Usury as to the Corporate Borrower in the District of Columbia,* 29 D.C. Bar Journal 196 (1962); Philipson, *The New District of Columbia Business Corporation Act,* 21 D.C. Bar Journal 499, 588, 592, 593 (1954).

[6] *Supra* note 4 and related text.

motion to dismiss the complaint.[7] Orally the judge announced his "opinion that the action in this case is barred by the statute." An order was entered on December 3, 1963 granting the motion to dismiss, but "with leave to amend within 20 days." A further order on December 19, 1963 extended the time within which an amended complaint might be filed to January 2, 1964.[8]

The appellant's "second amended complaint" was filed on January 2, 1964. Its allegations were unchanged from those of the first amended complaint except that appellant this time *pleaded* that the appellant is a Florida corporation which

> "was authorized to and did conduct business in the District of Columbia until plaintiff applied for and was issued, on June 9, 1960, a Certificate of Withdrawal by the Superintendent of Corporations pursuant to the provisions of Title 29, § 933(a) [*sic.*]."[9]

The appellees then filed their "Joint Motions . . . to Dismiss . . ." asserting as "the law of the case" that the second amended complaint failed to state a valid claim. That motion was argued before a "second judge" on March 23, 1964 and was granted. The second judge in ruling stated:

> "I want the order to show that the matters raised by the Second Amended Complaint were raised, argued,

---

[7] The previous day appellant had filed its "Supplemental Memorandum" contending that section 29-933a accorded a foreign corporation the same status as a domestic corporation *only* until a certificate of withdrawal "shall have been issued." Appended as an exhibit was a certified copy of a certificate of withdrawal issued to Indian Lake Estates, Inc. as of June 9, 1960, some four months before the instant action had been commenced.

[8] Pursuant to FED. R. CIV. P. 54(b), the order also provided that there "is no just reason for delay with respect to the order herein of December 3, 1963." The appellant did not appeal from the December 3 order.

[9] For D. C. CODE § 29-933a (1961) as pertinent here, see note 4 *supra*.

and decided by another judge of this court and that this is virtually a motion for a rehearing before me when it should be before the other judge."

The order entered March 24, 1964 recited "that all relevant issues" had been "raised and argued before" the first judge who had "granted the joint motion" of the appellees "to dismiss for failure to state a claim, and that the Second Amended Complaint presents no issues not decided" by the first judge. This appeal was taken from that order.

I

The appellees say at once that this appeal was not timely, not having been taken within 30 days of the December 3, 1963 order. They contend we must dismiss the appeal for lack of jurisdiction. We do not agree that all "relevant issues" had been raised and argued before the first judge. Nor was the December 3 order dispositive as "the law of the case," for the appellant had been granted leave to file its second amended complaint.

Filed within the time allowed, the second amended complaint placed before the second judge, *on the pleadings,*[10] an issue as to whether or not a foreign corporation previously qualified, possessed different status when it actually filed in advance of suit a certificate of withdrawal as permitted by section 29-933a. The first judge had filed no opinion. He simply stated "I am of the opinion that the action in this case is barred by the statute, and I will grant the motion to dismiss."

There is no suggestion whatever that the consequences of the fact of withdrawal had been put in contention before the first judge. Counsel for the appellees had made no

---

[10] Cf. Richardson v. Rivers, 118 U.S. App. D.C. 333, 335, 335 F. 2d 996, 998 (1964).

mention of the significance of the withdrawal of the appellant as a foreign corporation or the effect to be attributed to the purported change of status.[11]

Rather, the record shows the appellees were contending that D. C. CODE § 29-904(h) (1961) as set out in the 1954 Act and as amended in 1963 had barred the action. Specifically counsel submitted:

> "So we say it has been the law since 1954 but clearly since September 1963. No corporation in the District of Columbia may now plead usury under any usury statute either as a shield or as a weapon."

The first judge observed: "The only question before me is whether or not your cause of action is barred by the statute."[12]

Such was the background against which the first judge decided that "the action in this case is barred by the statute." And so it is we conclude that the second judge

---

[11] The first judge filed no written opinion, and the record does not show whether or not he considered, or how he interpreted, D. C. CODE § 29-934d (1961) which provides:

> "The revocation of certificate of authority or the *voluntary withdrawal of a foreign corporation* whereby its authority to do business in the District shall cease and be determined, shall not affect any action then pending, *nor affect any right of action upon any contract* made by the corporation in the District *before such . . . withdrawal . . . .*" (Emphasis added.)

[12] Undoubtedly with the possibility of a Richardson v. Rivers situation in mind, *supra* note 10, the first judge had earler expressed concern as to the posture of the case in view of this court's opinion, *supra* note 1, that *summary judgment* should not have been entered. Appellees' counsel then assured him that a corporation's "right to sue for usury was not argued in any way." There is no suggestion that the judge considered or took into account matter outside the pleadings. Cf. Gager v. "Bob Seidel", 112 U.S. App. D.C. 135, 139, 300 F. 2d 727, 731, *cert. denied*, 370 U.S. 959 (1962).

erred in ruling that all "revelant issues"[13] had been raised and disposed of by the December 3, 1963 order. The second amended complaint presented on the pleadings a quite different issue as to the status of the appellant, and the order entered March 24, 1964 dismissing the complaint was a final and appealable order.[14] The appeal taken April 9, 1964 was timely, and this court has jurisdiction of the case.[15]

II

We come at once to D. C. CODE § 29-904(h) (1961), as amended, D. C. CODE § 29-904(h) (Supp. IV, 1965), and its application to the claim of usury.[16] The pertinent language thus appears:

> "Each corporation shall have power:
>
> * * * * * * *
>
> "(h) To make contracts and incur liabilities; to borrow money at such rates of interest as the corporation may determine *without regard to the restrictions*

[13] He stated "I want the order to show that the matters raised by the Second Amended Complaint were raised, argued, and decided by another judge of this court." Of course, he need not have been bound in any event. Cf. Dictograph Products Company v. Sonotone Corporation, 230 F. 2d 131, 134-36, *rehearing denied*, 231 F. 2d 867 (2 Cir.), *petition for cert. dismissed*, 352 U.S. 883 (1956).

[14] Marotta v. Milestone, 114 U.S. App. D.C. 237, 314 F. 2d 242 (1963).

[15] Cf. Slater v. Peyser, 91 U.S. App. D.C. 314, 200 F. 2d 360 (1952).

[16] D. C. CODE § 28-2703 (1961) defines usury and provides that the creditor under the usurious contract "shall forfeit the whole of the interest so contracted to be received; *Provided*, That nothing in this chapter contained shall be held to repeal or affect sections 26-601 to 26-611." [Chapter 6—Money Lenders—Licenses, the "Loan Shark Law," *infra* note 23.] And see as to damages, Searl v. Earll, 95 U.S. App. D.C. 151, 156, 221 F. 2d 24, 29 (1954).

> *of any usury law; . . . No corporation formed* hereunder shall plead any statutes against usury in any action." (Emphasis added.)

As previously noted, appellant had contended that the amendment could have application only to corporations "formed hereunder." Here, however, this appellant as a Florida corporation had procured a certificate of authority to transact business in the District. It may even have sought to qualify in the first instance on the theory that it then would be able during the period of 1955 to 1959 "to borrow money at such rates of interest as the corporation may determine without regard to the restrictions of any usury law." When it received its certificate of authority, by virtue of section 29-933a, it became possessed of "the same rights and privileges as, but no greater rights and privileges than, a domestic corporation."

Chapter 27[17] of the District of Columbia Code deals generally with "Interest and Usury." Parties to written contracts may provide for interest not exceeding eight per centum, but if a corporation shall agree to pay a greater rate, the *creditor* shall forfeit the "whole of the interest so contracted to be received."[18] A corporation which actually shall have paid a "greater amount of interest than is herein declared to be lawful" may recover "the unlawful interest" from the creditor if suit be commenced within one year from the date of payment.[19] Yet other provisions of the Chapter dealt with various aspects of the "Interest and Usury" problem, including an express provision that as to contracts made or to be performed elsewhere wherein lawfully a higher rate of interest may be paid "than is

---

[17] D. C. Code §§ 28-2701 to 28-2709 (1961), since recodified with changes in D. C. Code §§ 28-3301—28-3306 (Supp. IV, 1965).

[18] *Supra* note 16.

[19] D. C. Code § 28-2704 (1961).

lawful in the District," a judgment for a plaintiff shall include the *contract* rate to the date of judgment.[20]

Such were the provisions affected when the 1954 Act in section 29-904(h) permitted corporate borrowing "without regard to the restrictions of any usury law."

The 1954 Act had not repealed earlier legislation affecting corporations in the District, nor did it in terms repeal the usury statutes as applicable to corporations. But enlarging a corporation's power to borrow without regard to lawful interest rates was clearly inconsistent with the usury statutes which permitted suit by the corporate borrower and recovery from the lender of "the whole of the interest" as contracted for.

Congress in the 1954 Act had permitted a corporation to seek financing here on whatever terms it might arrange. We can not believe it was intended that a foreign corporation might seek authorization to do business here, become a borrower in the District, accept the benefits of the legislation, thereafter withdraw from the District, and at the same time be freed from the detriments of its contract.

On the contrary, D. C. CODE § 29-934d (1961) provided that even if a certificate of withdrawal be filed by a foreign corporation, "in any action upon any liability or obligation so incurred before . . . withdrawal," process might be served upon the Commissioners.

In such circumstances Congress passed the 1963 amendment. Whatever other rights and duties might have devolved upon the parties to the contract, Congress simply said "statutes against usury" were not to be pleaded.

Since this appellant had gained its authority to do business in the District under the 1954 Act, by virtue of section 29-933a it became subject to all "restrictions" and

---

[20] D. C. CODE § 28-2709 (1961); and see *supra*, note 17. We mention this reference only because one of the contracts allegedly entered into between the parties here had involved Florida law. And see Seeman v. Phila. Warehouse Co., 274 U.S. 403, 407, 408 (1927).

otherwise as might be "now or hereafter imposed upon a domestic corporation of like character."[21]

The filing of the certificate of withdrawal, we are now satisfied, could not change the status appellant's contracts had acquired prior thereto. The 1963 amendment to section 29-904(h) simply clarified the applicable law so far as the usury statutes were involved. The complaint to recover usurious interest was barred by the statute.[22]

III

We now consider a quite different problem, for the appellant additionally had relied upon D. C. CODE §§ 26-601 to 26-611, sometimes known as the Loan Shark Law.[23] It is a licensing statute.[24] In *Hartman* v. *Lubar*[25] this court

---

[21] Compare D. C. CODE § 29-934f respecting restrictions upon suit by a foreign corporation transacting business here which had failed to procure a certificate of authority.

[22] Tennant v. Joerns, 329 Ill. 34, 160 N.E. 160 (1928).

[23] D. C. CODE § 26-601 (1961) provides in pertinent part:

> "It shall be unlawful and *illegal to engage* in the District of Columbia *in the business of loaning money* upon which a rate of interest greater than 6 per centum per annum is charged on any security of any kind . . . *without procuring license* . . . ." (Emphasis added.)

[24] This court so held in Reagan v. District of Columbia, 41 App. D.C. 409 (1914), explaining at 412:

> "This is not a usury statute as applied to the regulation of interest charges for the use of money in legitimate commercial transactions, but an act licensing, under limitations and restrictions, the loaning of money in small sums upon personal security."

Once a license shall have been issued to a qualified and complying money lender, interest charges are to conform to D. C. CODE § 26-605 (1961).

[25] 77 U.S. App. D.C. 95, 96-97, 133 F. 2d 44, 45-46 (1942), *cert. denied*, 319 U.S. 767 (1943). The court there further pointed out that § 26-601, *supra* note 23, was intended to be read together with a § 28-2703, *supra* note 16. It should be noted that the usury statute *explicitly* provides that *nothing* in the usury chapter shall affect the provisions here considered.

held that a usurious loan contract with a lender who was violating the licensing statute was illegal and void and that proof of the claimed violation should have been received. Thus, a borrower who had entered into a usurious contract, void because the lender was violating the statute, was entitled to recover from the lender any damages sustained by reason of the void contract.

The effect of a failure to comply with the licensing statute was again considered in *Royall* v. *Yudelevit*.[26] This court then pointed out that a right of action for damages may flow from a loan which is (1) usurious and (2) granted by an unlicensed lender. Merely to state the appellant's claim in broad terms may suggest it need prove only that the appellees were engaged "in the business of loaning money" without complying with the requirements of the licensing statute and had here entered into loans under which usurious interest had been exacted, as the result of which the appellant had suffered damage. It is clear, however, that this court's holding in the *Royall* case may apply *only* if the appellees can not establish an adequate, affirmative defense. We express no opinion whatever on the purported merits to the extent pleaded of record. Even so, the appellees would have us say that since one of the elements of such a claim involves proof of usury, section 29-904(h) as amended would bar the appellant's claim in any event.

We are not persuaded to that view. The District of Columbia Business Corporation Act is totally unrelated to the licensing statute now under consideration. The two statutes serve utterly different purposes. It would seem indisputable from the legislative history and from our cases that the Business Corporation Act and the law

---

[26] 106 U.S. App. D.C. 1, 4, 268 F. 2d 577, 580 (1959).

governing licensed lending[27] are independent legislative acts.

Congress has said, as here apropos, that a corporation may fund itself on any basis it determines but may not plead usury thereafter, *supra,* Part II.

It has likewise said that engaging in the business of lending money without being licensed to charge permitted rates is unlawful and illegal. And we have said that contracts illegally entered into under such circumstances are void, and that damages flowing from that type of transaction may be recovered unless the lender "can establish an adequate affirmative defense."[28]

There was error in dismissing the appellant's complaint insofar as it stated a claim as discussed in Part III of this opinion.

Reversed.

WILBUR K. MILLER, *Senior Circuit Judge,* concurs in Parts I and III of the foregoing opinion, and concurs in the result reached in Part II.

---

[27] And the usury statutes do not "affect" the licensing statute. See notes 16 and 25, *supra.*

[28] Royall v. Yudelevit, *supra* note 26.

APPENDIX B

[Filed December 3, 1963]

Order Granting Defendant's Motion To Dismiss

Upon consideration of the Motion of the ten named individual defendants herein and of the defendants Net Limited, Inc. and Special Investments, Inc. to dismiss plaintiff's amended complaint herein for failure to state a valid claim for relief, and after oral argument thereon in open court on this 27th day of November, 1963,

It is by the Court this 3rd day of December, 1963

ORDERED that the motion of the said defendants to dismiss the amended complaint herein be and the same is hereby granted, and it is further

ORDERED that the plaintiff's amended complaint be and the same is hereby dismissed, with leave to amend within 20 days.

/s/ JOSEPH C. MCGARRAGHY
Judge

[Filed December 19, 1963]

Order

This Court having entered an Order on December 3, 1963, granting the Motion of defendants to dismiss the Amended Complaint, and dismissing the Amended Complaint with leave to amend within 20 days, and it appearing the plaintiff desires an additional period to January 2, 1964 within which either to further amend or to appeal, and it further appearing that counsel for defendants do not object to such extension,

It is by the Court this 19th day of December, 1963, ORDERED, that:

1. Plaintiff's time within which to amend the Amended Complaint is hereby extended to January 2, 1964, and that

no further extension of time for leave to amend will be granted.

2. There is no just reason for delay with respect to the Order herein of December 3, 1963 ordering that the Complaint be dismissed, and the Court directs that judgment for defendants on said Order be entered accordingly.

/s/

Judge

Seen:

Ralph E. Becker

* * *

Attorney for Plaintiff

/s/ David G. Bress

* * *

Attorney for ten named individual defendants and defendant Net Limited, Inc.

/s/ Albert Philipson

* * *

Attorney for Defendant Special Investments, Inc.

[Filed March 24, 1964]

Order

Upon consideration of the motion of the ten individual defendants herein and of defendants Net Limited, Inc. and Special Investments, Inc. to dismiss the action for failure to state a valid claim for relief, and after oral argument thereon in open court on March 23, 1964, and it appearing that all relevant issues were raised and argued by counsel before Judge Joseph C. McGarraghy of this Court on November 27, 1963 and that Judge McGarraghy granted

the joint motion of defendants to dismiss for failure to state a claim, and that the Second Amended Complaint presents no issues not decided by Judge McGarraghy,

It is by the Court this 24th day of March, 1964

ORDERED that the motion of said defendants to dismiss the action be and the same is hereby granted, and it is further

ORDERED that the action be and the same is hereby dismissed.

/s/ DAVID A. PINE
Judge

APPENDIX C

[Filed October 7, 1965]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil 3516-60

No. 18,586

INDIAN LAKE ESTATES, INC., *Appellant,*

v.

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC., and SPECIAL INVESTMENTS, INC.

Before: WILBUR K. MILLER, *Senior Circuit Judge,* and FAHY and DANAHER, *Circuit Judges,* in Chambers.

Order

On consideration of appellees' petition for rehearing, of appellant's opposition thereto, and appellees' reply, it is

ORDERED by the court that appellees' petition for rehearing is denied.

Per Curiam.

Dated: October 7, 1965.

[Filed October 7, 1965]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil 3516-60

No. 18,586

INDIAN LAKE ESTATES, INC., *Appellant,*

v.

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC., and SPECIAL INVESTMENTS, INC., *Appellees.*

Before: BAZELON, *Chief Judge,* and FAHY, WASHINGTON, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM, and LEVENTHAL, *Circuit Judges,* in Chambers.

Order

On consideration of appellees' motion for leave to file a reply to the appellant's opposition to appellees' petition for rehearing *en banc,* it is

ORDERED by the court *en banc* that appellees' aforesaid motion for leave to file be granted; and the Clerk is directed to file appellees' lodged reply; and on consideration whereof, and of appellees' petition for rehearing *en banc* and appellant's opposition thereto, it is

FURTHER ORDERED by the court *en banc* that appellees' petition for rehearing *en banc* is denied.

Per Curiam.

Dated: October 7, 1965.

Chief Judge Bazelon did not participate in the foregoing order.

APPENDIX D

Federal Rules of Civil Procedure:

Rule 54. Judgments; Costs

* * *

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 73. Appeal to a Court of Appeals

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend

the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. . . .

Public Law 88-111, approved September 3, 1963.

That the District of Columbia Business Corporation Act, approved June 8, 1954 (68 Stat. 179; D. C. Code 29-901), is amended as follows:

(1) Section 4 of such Act is amended by adding at the end of subsection (h) the following new sentence: "No corporation formed hereunder shall plead any statutes against usury in any action."

D. C. Code (1961):

§ 29-904

Each corporation shall have power:

* * * * *

(h) To make contracts and incur liabilities; to borrow money at such rates of interest as the corporation may determine without regard to the restrictions

of any usury law; to issue its notes, bonds, and other obligations; and to secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income.

* * * * *

§ 29-933a

No foreign corporations subject to the provisions of this chapter shall transact in the District any business for the conduct of which a domestic corporation may not be organized or which is prohibited to a domestic corporation. A foreign corporation which shall have received a certificate of authority under this chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same rights and privileges as, but no greater rights and privileges than, a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character.

§ 28-2703 [*General usury statute*]

If any person or corporation shall contract in the District, verbally, to pay a greater rate of interest than six per centum per annum, or shall contract, in writing, to pay a greater rate than eight per centum per annum, the creditor shall forfeit the whole of the interest so contracted to be received: *Provided*, That nothing in this chapter contained shall be held to repeal or affect sections 26-601 to 26-611.

§ 26-601 [*Loan Shark Law*]

It shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money

upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license . . .

§ 26-605

No such person, firm, voluntary association, joint-stock company, incorporated society, or corporation shall charge or receive a greater rate of interest upon any loan made by him or it than one per centum per month on the actual amount of the loan . . . No such loan greater than two hundred dollars shall be made to any one person . . .

Office-Supreme Court, U.S.
FILED
FEB 25 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC.,
Petitioners

v.

INDIAN LAKE ESTATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United State Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

RALPH E. BECKER
F. MURRAY CALLAHAN
Brookhart, Becker & Dorsey
1700 K Street, N.W.
Washington, D. C. 20006
Counsel for Respondent

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
FEDERAL RULES OF CIVIL PROCEDURE INVOLVED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	11

CITATIONS

CASES:

Fisher v. *United States*, 328 U.S. 463, 476, 66 S. Ct. 1318, 1325 (1946) 5

General Motors Corporation v. *District of Columbia*, 385 U.S. 553, 14 L. Ed. 2d. 68, 85 S. Ct. —— (1965) 5

Grand Opera v. *Twentieth-Century-Fox Film Corp.*, 235 F. 2d 303, 307 (7th Cir. 1956) 10

Hartman v. *Lubar*, 77 U.S. App. D.C. 95, 133 F. 2d 44, Cert. den., 319 U.S. 767 (1943) 5, 6, 7

Holmberg v. *Williamson*, 135 F. Supp. 493, 494 (S.D.N.Y. 1955) 10

Indian Lake Estates, Inc. v. *Lichtman, et al.*, 311 F. 2d. 776, 777 (1962) 3

Miller v. *United States*, 357 U.S. 301, 306 (1958) 5

Reagan v. *D.C.*, 41 D.C. App. 409, 412 6

Richardson v. *Rivers*, 118 U.S. App. D.C. 333, 335 F. 2d 996 (1964) 10

Royall v. *Yudelevit*, 106 U.S. App. D.C. 1, 268 F. 2d 577 (1959) 3, 6

Sears, Roebuck & Co. v. *Metropolitan Engravers*, 245 F. 2d 67, 70 (9th Cir. 1956) 11

Temp-Resisto Corp. v. *Glatt*, 18 F.R.D. 148, 151 (D.N.J. 1955) 11

STATUTES AND RULES:

Loan Shark Law:
§26-601 D.C. Code Ann. (1961) 2

Usury Statute:
§28-2703-2704 D.C. Code Ann. (1961) 2, 7

D.C. Business Corporation Act:
§29-904(h); §29-933a; §29-934d, D.C. Code Ann. (1961) 3, 9, 10

Federal Rules of Civil Procedure:
Rule 12(b) (6) 3, 4, 8, 9, 10, 11
Rule 54(b) 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965
No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC.,
Petitioners

v.

INDIAN LAKE ESTATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 350 F.2d 435. The orders of the district court (Pet. App. 14a-16a) are not reported. The orders of the court of appeals denying rehearing (Pet. App. 16a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1965. Rehearing was denied on October 7, 1965. The time within which to file the petition for certiorari was

extended to January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the appeal taken by respondent on April 9, 1964, was timely, and thus the court of appeals had jurisdiction of the case.

2. Whether the court of appeals was correct in reversing the district court remanding the case for trial and affording respondent an opportunity to establish a claim under the Loan Shark Law, §26-601, D.C. Code (1961).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 12(b)(6). Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * * *

(b) *How Presented.* * * * (6) Failure to state a claim upon which relief can be granted, * * *. If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *.

STATEMENT

On October 25, 1960, plaintiff filed its complaint against ten named individuals and two corporate defendants, alleging violations of the usury statute, D.C. Code §28-2703 (1961), and also of the Loan Shark Law, D.C. Code §26-601-611 (1961); the amounts in controversy were alleged to be in excess of five and one-half million dollars. On October 18, 1961, the District Court granted defendants' motion for summary judgment.

On appeal, the United States Court of Appeals for the

District of Columbia Circuit reversed the grant of summary judgment. *Indian Lake Estates, Inc.* v. *Lichtman et al,* 311 F.2d 776, 777 (1962). The Court of Appeals, recognizing that respondent's claim was predicated on violations of both the usury statute and the Loan Shark Law, noted that the " * * * relationships of the litigants which are challenged as illegal and void arise out of numerous and complex contractual engagements, involving millions of dollars in the aggregate." Summarizing its reasons for reversal, the appellate court stated that the " * * * complex issues of fact and law as well as some which are mixed questions of law and fact, * * * were not susceptible of disposition by summary judgment." The appellate court concluded its brief opinion, citing *Royall* v. *Yudelevit,* 106 U.S. App. D.C. 1, 268 F.2d 577 (1959), an earlier decision of the same court, involving the usury statute and the Loan Shark Law.

Following reversal and remand to the District Court, respondent filed its first amended complaint alleging again that some 17 business dealings between the parties had been concluded in violation of both the usury statute and the Loan Shark Law and sought damages under the usury statute in the amount of $1,291,000, and damages under the Loan Shark Law in the amount of $2,125,819.31.

On September 13, 1963, petitioners filed a motion to dismiss under Rule 12(b)(6), on the ground that the complaint had failed to state a claim upon which relief could be granted and cited in support thereof a recent amendment to the District of Columbia Business Corporation Act providing:

> "No corporation formed hereunder shall plead any statutes against usury in any action." (D.C. Code §29-904(h)).

An order was entered on December 3, 1963, granting petitioners' motion to dismiss but "with leave to amend within twenty days." A further order, on December 19, 1963, ex-

tended the time within which an amended complaint might be filed to January 2, 1964, and also made provision under Rule 54(b) because of the presence of multiple claims and multiple parties.

On January 2, 1964, respondent filed its second amended complaint, in which, for the first time, respondent *pleaded* that it was a Florida corporation which had been issued a certificate of withdrawal by the Superintendent of Corporations of the District of Columbia and, hence, was not subject to the restriction on pleading usury recently placed on District of Columbia business corporations.

Petitioners renewed their motions to dismiss, under Rule 12(b)(6), for failure to state a claim and the same were granted on March 24, 1964. Respondent's appeal from the March 24, 1964, order was taken on April 9, 1964.

On August 4, 1965, dismissal by the District Court was again reversed by the United States Court of Appeals for the District of Columbia Circuit in an opinion which is reproduced in Petitioners' Appendix, and reported at 350 F.2d 435. In essence, the decision holds that respondent's appeal was timely, that, therefore, the court had jurisdiction of the case and that, while respondent was barred from pleading usury, it was entitled to a trial on the merits on its claim for relief under the Loan Shark Law. After petitions for re-hearing, by division or *en banc*, were denied by the Court of Appeals, petitioners asked this Court to grant certiorari.

ARGUMENT

There are several reasons, each of which alone would be sufficient, why this court should deny the petition for certiorari. In this case, filed in October 1960, and not yet tried, the United States Court of Appeals for the District of Columbia Circuit has twice recognized respondent's right to a trial on the merits of its claim based on violations of District of Columbia law licensing money-lenders. This

Court has often stated its policy of leaving the interpretation of the laws of the District of Columbia to the courts of the District of Columbia.

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher* v. *United States,* 328 U.S. 463, 476, 66 S. Ct. 1318, 1325 (1946).
>
> "In making reference to that law, we are mindful of our policy of not interfering with local rules of law fashioned by the courts of the District of Columbia." *Miller* v. *United States,* 357 U.S. 301, 306 (1958).
>
> *"We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District." General Motors Corporation* v. *District of Columbia,* 385 U.S. 553, 14 L. Ed. 2d 68, 85 S. Ct. —— (1965). (Emphasis supplied.)

The Loan Shark Law has been in effect in the District of Columbia since 1913, and the Court of Appeals for the District of Columbia Circuit has had at least five occasions to construe and apply its provisions, the last two opinions involving the case at bar. The Court of Appeals has consistently sustained the right of claimants to establish entitlement to relief for violations of the licensing provisions of the Loan Shark Law. On one previous occasion, this Court declined to review a decision of the Court of Appeals for the District of Columbia Circuit construing and applying the Loan Shark Law in a manner consistent with the decision sought to be reviewed here. *Hartman* v. *Lubar,* 77 U.S. App. D.C. 95, 133 F.2d 44, cert. den., 319 U.S. 767 (1943).

Furthermore, the decision of the Court of Appeals is eminently correct and consistent with its earlier opinions defining the purpose and scope of the Loan Shark Law.

The court below, while noting that the 1963 amendment

to the District of Columbia Business Corporation Act barred respondent's claim under the usury statutes, carefully distinguished between a litigant's rights under the usury laws and those which arise as a result of a licensing statute such as the Loan Shark Act.

Disregarding the clear distinction spelled out in the opinion below, petitioners persist in contending that the Loan Shark Law is merely another usury statute, and thus that the 1963 amendment to the Business Corporation Act prevents respondent, as a corporation, from pleading any statute against usury. Petitioners' argument totally ignores both the earlier decisions of the Court of Appeals construing the Loan Shark Act and the historic difference between the body of law concerned with usury and the law's treatment of contracts made in violation of statutes against public policy.

As noted in the opinion below, the Court of Appeals, as early as 1914, held that the Loan Shark Law " * * * is not a usury statute * * * ". *Reagan* v. *D.C.*, 41 D.C. App. 409, 412. The Court of Appeals also cited its earlier decisions in *Hartman* v. *Lubar*, 77 U.S. App. D.C. 95; 133 F. 2d 44 (1942) and *Royall* v. *Yudelevit*, 106 U.S. App. D.C. 1; 268 F. 2d 577 (1959). In *Hartman, supra,* the Court of Appeals noted that a contract made in violation of the Loan Shark Law was illegal and void. In *Royall, supra,* the Court of Appeals elaborated on the effect of a violation of the Loan Shark Law by stating that a different and separate cause of action flows from said violation, than arises as a result of transgressing a usury statute.

> "A lender in a loan contract which is merely usurious may not be liable in damages. But if there is added to the situation the fact that the lender was not licensed as required by law, the loan contract is unlawful and void, and a foreclosure thereunder is wrongful and gives rise to an action for damages suffered therefrom." *Royal, supra,* 268 F. 2d, at page 580.

Construction of the Loan Shark Law as contained in the opinion below, and in the earlier decisions of the Court of Appeals, is obviously based on an awareness that usury and licensing statutes are predicated on clearly distinguishable principles.

The statute concerning usury in the District of Columbia provides that a person paying usurious interest is merely entitled to recover "the amount of the unlawful interest so paid". §28-2704, D.C. Code (1961 Ed.) The District of Columbia statute thus establishes a measure of damages for a usurious bargain but does not render the contract or agreement illegal or void.

The opposite is true, however, as to a contract made in violation of the Loan Shark Law. In *Hartman* and *Royall, supra,* the Court of Appeals uses the following four adjectives to describe a contract in violation of the Loan Shark Law—illegal, unenforceable, unlawful and void. In *Hartman, supra,* the Court of Appeals said:

> "The Act, which appears in the 1940 Revision of the District of Columbia Code as Section 26-601 et seq., makes it 'unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license * * *.' If the disputed loan was made by one who was engaging in the business of lending money in violation of the law, and if the loan was made in the course of that business, then it constituted an illegal contract. The general rule is that an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer. The present case comes under no exception to the general rule. Every consideration of public policy suggests that a contract made in violation of the Loan Shark Law should be unenforceable." 133 F. 2d. at p. 45.

Separate and distinct causes of action arise under usury

statutes, than are created by violations of licensing ordinances, bottomed on the police power of the state. There is nothing in the 1963 amendment to the D.C. Business Corporation Act indicating the slightest intention, on the part of Congress, to take away from corporations their right to assert violations of a licensing statute that has been the law of this jurisdiction since 1913.

Contrary to petitioners' contention, the effect of the Court of Appeals' decision will not be any windfall to corporate borrowers, but rather a timely reminder that anyone in the business of lending money must abide by the sound and reasonable provisions of District of Columbia laws and regulations designed to protect financially necessitous citizens from unscrupulous lenders.

Respondent's procedural argument that the appeal was untimely revolves around a perfectly irrelevant discussion of Rule 54(b). At the same time, there is a painfully obvious refusal by respondent to discuss the only pertinent rule involved, namely, 12(b)(6), governing a motion to dismiss for failure to state a claim upon which relief can be granted.

After the dismissal of the first amended complaint, the respondent sought a Rule 54(b) order, because of the multiplicity of parties and claims involved herein. Upon the filing of a second amended complaint, the previous Rule 54(b) order was superseded and became of no effect.

The reason that respondent's appeal was timely is found in the clear language of Rule 12(b)(6) and the judicial precedents interpreting and applying said rule.

After the adoption of the Federal Rules, many courts held that the motion to dismiss for failure to state a claim (12(b)(6)) was no different from the old demurrer and that such motion was therefore limited to matters appearing on the face of the complaint. Owing to a lack of uniformity in said view, however, the Rules were amended in 1946 by the addition of a sentence to Rule 12(b)(6) reading:

"If, on a motion asserting the defense numbered (6)

> to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment *and disposed of as provided in Rule 56,* and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis supplied.)

The Court of Appeals, in the opinion below, on pages 4 through 8 (Pet. App. 4a-8a), took great pains to explore the state of the record, particularly the contents of the First Amended Complaint before the District Court at the time of petitioners' first motion to dismiss, and, thereafter, the contents of the second amended complaint at the time of the second motion to dismiss, both made under Rule 12(b)(6). The Court of Appeals correctly found that the First Amended Complaint did not put in contention, *on the pleadings,* the consequences of §29-933a, D.C. Code (1961 Ed.). As noted by the Court of Appeals, the First Amended Complaint did not contain an allegation predicated on respondent having been granted a certificate of withdrawal as permitted by §29-933a, *supra.* Also, the Court of Appeals observed on page 7 of its opinion, footnote 11 (Pet. App. 7a), that the record does not show whether or not the first judge considered or how he interpreted §29-934d, D.C. Code (1961).

It is of critical importance procedurally that the first judge granted petitioners' Motion to Dismiss under Rule 12(b)(6), *with leave to amend,* and *did not* dispose of the motion as one for summary judgment. Having so dealt with petitioners' motion, the first judge, following the clear language of Rule 12(b)(6), and decisions of the Court of Appeals for the District of Columbia, and other courts interpreting said rule, *necessarily excluded all matter outside the pleadings.* As the Court of Appeals notes on page 6 of its opinion:

> " * * * the second amended complaint placed before the second judge, *on the pleadings,* an issue as to whether or not a foreign corporation previously qualified, possessed different status when it actually filed in advance of suit a certificate of withdrawal as permitted by section 29-933a." (Pet. App. 6a).

Since the Second Amended Complaint placed, *on the pleadings,* an important issue not contained in the First Amended Complaint, the Second Amended Complaint was for *all purposes* a valid and substantive amendment of the First Amended Complaint. The Court of Appeals was thus indisputably correct in finding that an appeal from the dismissal of the Second Amended Complaint was proper and that the Court of Appeals had jurisdiction of the case.

The petition for certiorari is, on its face, inadequate in that it completely avoids any reference to either Rule 12(b)(6) or the large body of judicial precedents concerned therewith. The Court of Appeals was eminently correct in relying on *Richardson* v. *Rivers,* 118 U.S. App. D.C. 333; 335 F. 2d 996 (1964), where it was found that matters outside the pleading were presented and thus the motion should have been treated as one for summary judgment. In this case, the converse was true, namely, that since the first judge granted the motion to dismiss, and did not treat it as one for summary judgment, he necessarily excluded anything not found within the four corners of the Complaint. Among the many other decisions adumbrating this rule are *Grand Opera* v. *Twentieth-Century-Fox Film Corp.,* 235 F. 2d 303, 307 (7th Cir. 1956), stating that on a Rule 12(b) motion a District Judge "had no right to consider any facts except those well-pleaded in the amended complaint."

"It is *elementary* that on a motion to dismiss the complaint, the Court may consider nothing except the pleading." *Holmberg* v. *Williamson,* 135 F. Supp. 493, 494 (S.D.N.Y. 1955). (Emphasis Supplied)

In *Temp-Resisto Corp.* v. *Glatt,* 18 F.R.D. 148, 151 (D.N.J. 1955), the Court said: "In deciding the motion to dismiss the Court must disregard the affidavits and consider only the allegations of the complaint."

In *Sears, Roebuck & Co.* v. *Metropolitan Engravers,* 245 F. 2d 67, 70 (9th Cir. 1956), that court, discussing the function of Rule 12(b)(6), said:

> "The court was not considering a motion for summary judgment. Consideration was therefore limited to matters appearing on the face of the pleadings. The applicable rule expressly so provides.[5] " (Footnote 5 quotes the language of 12(b)(6)).

Since, as the Court of Appeals found, the second amended complaint was a substantive amendment of the pleadings, the respondents were justified in taking their appeal from the dismissal thereof, and, hence, said appeal was timely and conferred jurisdiction on the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH E. BECKER
F. MURRAY CALLAHAN
Brookhart, Becker & Dorsey
1700 K Street, N.W.
Washington, D. C. 20006
Attorneys for Respondent

MOTION FILED

MAR 2 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC., *Petitioners*

v.

INDIAN LAKE ESTATES, INC., *Respondent*

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, WITH COPY OF BRIEF ATTACHED

ARTHUR J. HILLMAN
Suite 1250
1030 15th Street, N. W.
Washington, D. C. 20005

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC., *Petitioners*

v.

INDIAN LAKE ESTATES, INC., *Respondent*

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The undersigned respectfully moves the Court for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari, pending herein, and attaches hereto a copy of such brief. As ground therefor movant states that in said brief he draws to the attention of the Court the impact of the decision below upon commercial corporate borrowers in the District of Columbia and upon the economy of the District of Columbia. These matters have not been presented by

the parties. Consent to the filing of this motion has been requested of petitioners and respondent; petitioners have consented but respondent has withheld its consent.

ARTHUR J. HILLMAN
Suite 1250
1030 15th Street, N. W.
Washington, D. C. 20005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC., *Petitioners*

v.

INDIAN LAKE ESTATES, INC., *Respondent*

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned as *amicus curiae* urges the Court to grant the pending petition for a writ of certiorari. The decision below that corporations barred by Congress from pleading "statutes against usury" may nevertheless plead the Loan Shark Law, D.C. Code (1961) §§ 26-601 - 26-611, is of major importance not only to lenders, but also to sophisticated corporate borrowers engaged in enterprises for which commercial

bank financing is not readily available. The undersigned as *amicus curiae* respectfully draws the attention of the Court to the ill consequences of the decision below to such borrowers.

At least since 1954—until the decision below was handed down—both lenders and borrowers have proceeded in the belief that corporations could not plead the Loan Shark Law as well as other usury statutes. As a direct consequence of the decision below, lenders who might otherwise continue making loans to corporations have discontinued this business because of fear that the borrower might plead the Loan Shark Law. This drying up of the credit market has adversely affected sophisticated commercial borrowers in the District of Columbia.

The Court below holds that ever since 1954 corporations have been barred from pleading general usury statutes by the District of Columbia Business Corporation Act, D.C. Code § 29-904(h), empowering corporations to borrow money "without regard to the restrictions of any usury law". 350 F. 2d 435, 440-441; Appendix A to petition herein, pp. 10a-11a. The 1963 amendment precluding corporations from pleading "any statutes against usury", says the court, "simply clarified the applicable law . . ." 350 F. 2d at 441; Appendix A at 11a.

However, the court below now holds that despite the broad language of the statutes—in 1954, "any usury law", and in 1963, "any statutes against usury"—Congress intended to deny to corporations only the general usury statute remedy, and to leave them free to plead the Loan Shark Law. This comes as a startling development.

The Congressional policy adopted in 1954, depriving corporations of remedies afforded by usury statutes, now prevails in 23 states. Curran, *Trends in Consumer Credit Legislation* (1965) 19, n. 53. That policy rests on the conviction that corporations are sophisticated commercial borrowers and that commerce is furthered by making it clear that such borrowers cannot invoke usury remedies. *Comment,* 23 Md. L. Rev. (1963) 51, 54, 55.

The policy barring corporations from pleading general usury statutes applies with equal force to the Loan Shark Law. "Usury" is excessive interest, and the Loan Shark Law is a specialized usury law, for it regulates the rate of interest. Thus, the statute applies only to the business of loaning money at more than 6%, and it permits a licensed lender to charge 12%. D.C .Code (1961) §§ 26-601, 26-605. The Loan Shark Law is a small loan statute of a kind which is "in force in all states except Alaska". Curran, *op. cit. supra,* 16. When Congress acted in 1954 and 1963, small loan acts such as the D.C. Loan Shark Law were uniformly regarded as specialized usury laws, and Congress in barring corporations from pleading "any usury law" and "any statutes against usury" must have intended by that language to embrace the Loan Shark Law. See Curran, *op. cit. supra,* 16; Hubachek, *Progress and Problems in Regulation of Consumer Credit,* 19 Law and Contemp. Prob. (1954) 4. The decision below points to no reason for nullifying the intent of Congress so clearly expressed.

The consequences of the decision, if allowed to stand, are bizarre. The Loan Shark Law, like similar small loan acts, was primarily intended to protect small consumer borrowers, who might otherwise be the victims

of loan sharks.[1] But the statute has been construed to mean that although licensed lenders are authorized to make loans up to $200, a loan by an unlicensed lender is illegal even though it exceeds this maximum. *Hartman* v. *Lubar,* 77 U.S. App. D.C. 95, 133 F. 2d 44 (1942). Thus, since 1942 the Loan Shark Law as construed by the court below has embraced commercial loan transactions as well as loans for consumption. It was the clear intent of Congress when it acted in 1954 and again in 1963 to remove from the operation of the statute commercial loan transactions where corporations are borrowers.[2] The decision below frustrates and defeats that intent. The result prejudices sophisticated commercial borrowers and adversely affects the economy of the District of Columbia.

---

[1] However, because the Loan Shark Law permits an interest rate lower than that of other small loan acts, the statute has been virtually inoperative ever since its enactment in 1913. Hubachek, *The Drift Toward A Consumer Credit Code* (1949) 16 U. Chi. L. Rev. 609, n. 23; H. Rept. 1629, 72d Cong., 1st Sess., p. 2; Woll, *Organized Labor Views the Loan Shark Problem,* 19 Law and Contemp. Prob. (1954) 96, 100; Robinson and Nugent, *Regulation of the Small Loan Business* (1935) 246. In actual fact the small consumer loan business has gone to the Maryland and Virginia suburbs, where similar small loan acts provide the lenders with a higher legal interest rate.

[2] We do not take issue with *Hartman* v. *Lubar,* and Congress has not acted to nullify the holding in that case that the Loan Shark Law applies to commercial loans made to individual borrowers. What Congress did in 1954 and 1963 was to withdraw from the scope of usury statutes, including the Loan Shark Law, commercial loans involving corporations as borrowers. It is obvious that Congress intended to bring the law of the District of Columbia into alignment with that of Maryland and Virginia, which by statute have long barred corporations from pleading usury. Anno. Code of Md. (1957) Art. 23, § 125; Code of Va. (1950) § 6-351.

If the decision stands, a corporate borrower may not plead the general usury statute, D.C. Code (1961) § 28-2703, which provides for forfeiture of interest, but is nevertheless free to plead the Loan Shark Law, which operates to forfeit both principal and interest, *Hartman* v. *Lubar, supra.* Clearly, lenders will not subject themselves to such risk. This shutting off of an established source of credit negates the intent of Congress.

It is believed that the decision below is so insupportable that eventually it will be overruled. In the meantime, however, so long as it stands, it creates confusion and insecurity among commercial lenders and borrowers. The problem is so widespread and the decision has such major impact that this Court should grant certiorari.

ARTHUR J. HILLMAN
Suite 1250
1030 15th Street, N. W.
Washington, D. C. 20005